No. 50

In the Supreme Court of the United States.

OCTOBER TERM, 1942

HARRY PYLE, *Petitioner*,

vs.

STATE OF KANSAS and MILTON F. AMRINE, Warden Kansas State Penitentiary, *Respondent*.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

BRIEF FOR RESPONDENT

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19-5556

INDEX

CASES CITED

STATUTE CITED

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BRIEF FOR RESPONDENT

ARGUMENT

In this cause the history of the case has been set out by counsel for the petitioner in his brief filed herein, and consequently, we deem it unnecessary to encumber the record by any reiteration thereof, and in considering such brief in its entirety, we believe that the principal controversy arises from the difference in conclusions reached under IC and that portion of the brief designated as II. In view of this and because of the similarity of the arguments to be advanced upon both propositions, we deem it advisable to combine the two.

However, before proceeding to the arguments, we

deem it advisable to go further into the facts underlying this entire cause. It is rather unfortunate that the petitioner's application for a writ of habeas corpus, filed in the Supreme Court of the State of Kansas, was prepared by himself or possibly by a cellmate, for the reason that procedure and evidence are rather indiscriminately interwoven. However, we do not wish to be understood that such should work to the disadvantage of petitioner, but we are forced to use his entire proceedings as we found them to have been filed.

Petitioner, in his application in the state court, speaks of "record" and "records," from which it is apparent that he refers to the "record" and "records" of the District Court of Stafford County, the county wherein he was convicted. In such application for a writ of habeas corpus, the petitioner herein makes various allegations as to what such "record" will show if produced in the Supreme Court of the State of Kansas.

Cited in the brief of petitioner herein is *State v. Pyle*, 143 Kan. 772, 57 P. 2d 93, which is the case in which the conviction of this petitioner was affirmed by the Supreme Court of the State of Kansas. We submit that the Supreme Court of the State of Kansas, when viewing the allegations of petitioner in his application for a

writ of habeas corpus, and when called upon to pass upon allegations as to what "records" will now show, ought not to be confined to such allegations, but would have a right to consider its own knowledge of what those records did and would actually show, and consequently from the reported case of *State v. Pyle*, supra, we now make the following statement of facts:

On the evening of December 23, 1934, two bachelor farmers lived in Stafford County, Kansas, on a farm located about a mile and a half southwest of what was called the Willinger filling station. These bachelor brothers owned and had buried near their farm home United States Government bonds of the value of $24,000.00. Living at Dodge City, Kansas, some fifty miles from the home of these bachelors, was a man named Lacy Cunningham, who was acquainted with the petitioner herein, and with a son of the petitioner, called "Babe" Pyle. Cunningham had knowledge that these bachelors owned Government bonds and claimed to be able to dispose of stolen bonds. While in his petition in this cause, the petitioner claims that he knew nothing of the actions or associates of his son, Babe Pyle, the facts as disclosed by the records, show that this petitioner and his son, Babe Pyle, lived in a garage

in the outskirts of the city of Hutchinson, Kansas; that both were acquainted with Lacy Cunningham and that some months prior to the murder and robbery of which petitioner was convicted, he had a conversation with Cunningham in which discussion was had of a large amount of bonds "that could have been got" a short time before. In this conversation mention was made of the Willinger filling station and of bachelors. Six days prior to such murder and robbery, petitioner herein sent a telegram to Cunningham, asking, "When can you come? Prospects good." Cunningham replied that he would be in Hutchinson the following morning and did in fact go to Hutchinson and spent two or three days at the Pyle place in company with petitioner and Babe Pyle, who was there a part of the time, *i. e.*, after his release from jail on a criminal charge. During that time conversations were had between these men concerning bonds and again that same filling station was mentioned, as was also the term "bachelors," as is shown by the following questions and answers:

"Q. At any time that morning was anything said abount bachelors?
A. Well, they (Harry and Babe Pyle) said something about that they lived a mile west and a mile south of the Willinger filling station.
Q. Who lived there?
A. Bachelors."

Following this conversation, petitioner herein, and Cunningham went to the west part of the state of Kansas, where petitioner remained until the evening of December 22, 1934, he having last been seen some fifty miles from the Willinger filling station, on the evening of December 23, 1934. A car containing an unknown number of men called at the home of the two bachelor brothers and committed an assault upon each of them, in which assault one of the brothers was shot and fatally wounded. The other was badly mistreated, and was subjected to inhumane and excruciating torture until he revealed the hiding place of their bonds. The murderers and robbers, after obtaining the bonds, left the place and these wounded men in such condition that one died within a day or two.

Petitioner herein was, within three or four days, arrested and charged with the crimes of murder and robbery. With him was arrested Cunningham, Babe Pyle and one Bud Richardson. Separate trials were had, with the result that this petitioner and his son were convicted. Petitioner duly appealed to the Supreme Court of the State of Kansas and his conviction was affirmed in *State v. Pyle*, supra.

With the above statement of facts, we now proceed to the question discussed by petitioner's designation IC:

For some reason not disclosed herein, the Supreme Court of the State of Kansas denied petitioner's application for a writ of habeas corpus and filed no opinion therein, and such Court likewise denied petitioner's application for a rehearing (R. 30). No opinion was filed at the time the application for rehearing was denied.

Petitioner herein, or his counsel, has set out in the appendix to his brief, the statutes of Kansas pertaining to procedure in causes of this nature. We now call the attention of this Court to the record filed herein, and particularly to the copy of the petition for a writ of habeas corpus which this petitioner actually filed in the Supreme Court of the State of Kansas, and which copy is shown on pages 1 and 2 of the record. Such petition is signed, "Harry Pyle, Petitioner in Forma Pauperis." Appended thereto, as the Court will note, is a form to be used for verification, but such form was not in fact used, and the petitioner did not file in this cause upon which writ of certiorari was granted herein, a verified petition as required by the statutes of the state of Kansas. (Corrick, 1935.) Section 60-2203 provides:

> "Application for the writ shall be made by petition, signed and verified either by the plain-

> tiff or by some person in his behalf, and shall specify: . . ." (Brief of Petitioner, p. 14.)

Consequently, since this petition is an unverified petition, we contend that it was the duty of the Supreme Court of the State of Kansas to deny such application and that therefore petitioner has not filed a proper application for a writ of habeas corpus in the state court, and there is now presented to this Court a non-Federal question.

We do not wish to encumber the record any further than necessary, and consequently shall not set out the rules of our Supreme Court requiring the filing of abstract, which must also be certified, and this was not done in the instant case, although, as before stated, we do not desire to charge the petitioner herein with too strict compliance, but do insist that the Supreme Court of the State of Kansas could not entertain an application for a writ of habeas corpus contrary to the mandate of the Legislature of the same state.

There is, in our opinion, another reason why the Supreme Court of the State of Kansas was justified in denying petitioner's application for a writ of habeas corpus filed before it. A careful examination of the allegations contained in such petition will fail to disclose that any material perjured testimony was offered against

this petitioner in his trial in the District Court. Contained in the record is a copy of an affidavit made by one Truman Reynolds, which at most is a verified opinion of the guilt or innocence of petitioner. Affiant states that he was forced to give prejured testimony against petitioner, but nowhere in such affidavit nor in the records herein, is there any showing as to what false testimony was given, nor is there any showing that the verdict of the jury might have been otherwise except for such claimed perjured testimony. Also in the affidavit is a statement by the affiant that petitioner "has never approached me at any time to commit or help to commit any unlawful act." Affiant does not say that he testified to any such fact in the trial, nor does petitioner anywhere make any claim that any such testimony was offered. The affiant might have added that Mr. Pyle never confessed to him that he committed this murder and robbery. Such an allegation would not mean that affiant did in fact testify to this fact, and yet a reader of the affidavit might infer that he did give such testimony.

Under the rules of procedure in the state of Kansas, if an appellant contends that he has newly discovered evidence which is material to his cause, and seeks a new trial because thereof, then he must set forth such newly

discovered evidence. If an appellant contends that certain evidence has been denied admission, then on his motion for a new trial, as well as in his appeal, he must set forth the suppressed evidence. It is not enough that he make bare allegation of such fact.

State v. Wellman, 102 Kan. 503, 170 Pac. 1052.

The same rule, we think, should and does apply in case of an application for a writ of habeas corpus.

Kessinger v. Amrine, 154 Kan. 207, 117 P. 2d 565.

The Reynolds affidavit is the nearest incident in which perjured testimony was used against him according to the allegations of petitioner.

In this same connection, the petitioner complains of suppressed testimony, but wholly fails to set out any testimony of any witness which he complains was suppressed in the trial and wherein he was convicted of these two offenses.

The petitioner has resorted to a unique procedure in this case. Among his exhibits as contained in the record, is a letter written by one who apparently at one time was interested in the defense of this petitioner and which interest seems to have been prior to his conviction and continues to this date. We maintain that there is no evidentiary facts set forth in such letter, which were not or could not have been known to peti-

tioner at the time of his trial and conviction. The mere inference which might be gained therefrom is an attempt to show that petitioner was denied his right to counsel. That inference cannot be maintained, for, as shown by the reported case of *State v. Pyle*, as well as is shown by the records in this Court, this petitioner was represented at all stages during his trial, conviction and appeal. (See journal entry, transcript of record, pp. 21-25, inc.) On page 26 of such record is shown a portion of the copy of the trial judge's docket, in which it is shown that counsel for petitioner spent one hour and fifty-eight minutes in his argument on the motion for a new trial. The reported case of *State v. Pyle* shows the same attorney represented petitioner in his appeal, and from that opinion written by Chief Justice Dawson, we quote as follows:

> ". . . In the instant case the alert and skillful counsel for defendant who so assiduously guarded every right of this defendant from the moment the case was called until judgment was pronounced . . ." (pp. 781, 782.)

A careful reading of the affidavit of Attorney Arthur H. Snyder, and as set out in the record furnished herein by petitioner, fails to show any evidence not known to petitioner at the time of his trial.

Also contained in the record herein is copy of a letter

written some time after the trial, by one C. W. Slifer, who was holding the office of county attorney during the time of the trial of petitioner in the District Court of Stafford County, Kansas. It is readily apparent that this letter is evidence of nothing. It is unverified and contains at most only an expression of an attorney given some six years after conviction was obtained. The journal entry of conviction herein referred to shows that Robert Garvin was associated with Mr. Slifer in the trial of this case. The most that can be said concerning the letter of Mr. Slifer is that he does not personally agree with the verdict of the jury.

Under Kansas procedure (and we think under the procedure of all other states), the prosecuting attorney need not agree with the verdict in order to give it validity. In the state of Kansas the trial judge sits as the thirteenth juror, and before a verdict of a jury can become effective and any judgment rendered thereon, that verdict must have the approval of the trial judge. In this case the trial judge who had heard all evidence, gave his approval to the verdict, and solemn judgments of court ought not be set aside some years later by a writ of habeas corpus because some office-holder has changed his mind.

At the risk of being criticized for an unduly long

argument herein, and in connection with what petitioner terms "merits of case," we cannot help being impressed by the apparent desire of the petitioner to evade a production of the true state of facts as they existed out at this farm home on the night of December 23, 1934. He complains that the state afterwards tried one Merl Hudson and convicted him of complicity in this murder and robbery. He complains that the evidence introduced in the Hudson trial is not identical to that introduced in the trial wherein he was convicted of these same offenses. This may be true. It is seldom that in separate trials of criminal cases, identical evidence will be introduced in each. It is significant that petitioner herein points out that his own son, Babe Pyle, one Wilbur Stover, a convicted murderer, and the wife of Merl Hudson testified against Merl Hudson and that on such testimony Merl Hudson was convicted of this murder and robbery. Consequently, Merl Hudson, Wilbur Stover, Babe Pyle and Mrs. Merl Hudson must have some valuable evidence as to the identity of the perpetrators of this crime.

The petitioner herein demands that the Supreme Court of the State of Kansas subpoena a number of persons to testify on his behalf and whereby he might show that his conviction was wrongful, and yet petitioner

does not call for the testimony of his own son, who, by implicating Merl Hudson and testifying thereto, must have been one of the murderers. Petitioner does not call for the testimony of any of the other four persons just herein mentioned, and who must know who killed this old bachelor. It would of course be highly improper for us to quote or attempt to quote any evidence of any of these conspirators as given in the trial of Merl Hudson, but we do have a right to our belief that this petitioner does not desire any cross examination of any of such witnesses, particularly as it might apply to his own whereabouts on the night of this murder. Instead, he asks the Supreme Court of Kansas to bring in witnesses, some of whom testified in his own case, and to bring in others, the nature of whose testimony is unknown.

CONCLUSION

In conclusion, we submit that the decision of the Supreme Court of the State of Kansas was correct for both reasons hereinbefore discussed. To decide otherwise would, in our opinion, unduly burden the courts with cases of this nature. Were the rules of procedure otherwise, then this petitioner could file in the Supreme Court of the State of Kansas, application for a writ of habeas corpus, based upon the grounds that the first witness

who testified against him gave prejured testimony. Upon denial of his first application he could file his second application for a writ, based upon the ground that the second witness who testified against him gave prejured testimony, and so on until he had exhausted the list of witnesses who testified against him. If it is unnecessary to verify his petition or petitions, then he has no fear of prosecution for perjury. If he need not set out the particular testimony which he contends was prejury, then the Court must, with patience, hear each case so presented by him. He could then use each defense witness as a basis for separate applications for writ of habeas corpus by contending that testimony from each of such witnesses was suppressed by fear and intimidation, all by the mere allegation of coercion and intimidation. He might be entitled to an appeal to this Court after each such refusals.

In our humble opinion, this is not the law, and that petitioner having failed in the two particulars above pointed out, the decision of the Supreme Court of the State of Kansas should be affirmed.

Respectfully submitted,

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19-5556

SUPREME COURT OF THE UNITED STATES.

No. 50.—October Term, 1942.

Harry Pyle, Petitioner,
vs.
State of Kansas and Milton F. Amrine, Warden, Kansas State Penitentiary.

On Writ of Certiorari to the Supreme Court of the State of Kansas.

[December 7, 1942.]

Mr. Justice Murphy delivered the opinion of the Court.

Petitioner seeks to review an order of the Supreme Court of Kansas denying his application for writ of habeas corpus. In 1935 petitioner was convicted by a jury in a Kansas state court upon an information charging him with the crimes of murder and robbery. A motion for a new trial was overruled, and he was sentenced to life imprisonment under his conviction for murder, and to a term of from 10 to 21 years for robbery. On appeal the judgment was affirmed by the Supreme Court of Kansas. *State* v. *Pyle*, 143 Kan. 772, 57 P. 2d 93.

On November 20, 1941, petitioner, a layman acting in his own behalf, filed an original application for writ of habeas corpus in the Supreme Court of Kansas. The crude allegations of this application charge that his imprisonment was the result of a deprivation of rights guaranteed him by the Constitution of the United States, in that the Kansas prosecuting authorities obtained his conviction by the presentation of testimony known to be perjured, and by the suppression of testimony favorable to him. Filed with this application were a brief and an abstract, also apparently prepared by petitioner himself, which are part of the record before us. These documents elaborate the general charges of the application, and specifically allege that "one Truman Reynolds was coerced and threatened by the State to testify falsely against the petitioner and that said testimony did harm to the petitioner's defense"; that "one Lacy Cunningham who had been previously committed to a mental institution was threatened with prosecution if he did not testify for the State"; that the testimony of one Roy Riley, material to petitioner's

defense, "was repressed under threat and coercion by the State"; that Mrs. Roy Riley and Mrs. Thelma Richardson were intimidated and their testimony suppressed; and, that the record in the trial of one Merl Hudson for complicity in the same murder and robbery for which petitioner was convicted, held about six months after petitioner's direct appeal from his conviction, reveals that the evidence there presented is inconsistent with the evidence presented at petitioner's trial, and clearly exonerates petitioner.

Certain exhibits accompanied the application; among these were copies, sworn by petitioner to be true and correct copies of the originals, of an affidavit executed by Truman Reynolds in 1940, and a letter dated February 28, 1941, from the former prosecuting attorney who represented the State at petitioner's trial. The affidavit contained a statement that affiant "was forced to give perjured testimony against Harry Pyle under threat by local authorities at St. John, Kansas and the Kansas State Police, of a penitentiary sentence for burglary if I did not testify against Mr. Pyle". The letter stated, "Your conviction was a grave mistake", and further that, "The evidence at the trial of Murl Hudson certainly shattered the conclusions drawn from the evidence produced at your trial."

In connection with his application petitioner moved for the appointment of counsel to represent him, for subpoenas duces tecum to bring up the records in the trials of Merl Hudson and one Bert (Bud) Richardson, for the subpoenaing of certain witnesses allegedly material to his case, and for his presence in court. The record does not show what disposition, if any, was made of these various motions.

No return was made to the application for the writ. On December 11, 1941, the court below entered an order "that said petition be filed and docketed without costs, and thereupon, after due consideration by the court, it is ordered that said petition for writ of habeas corpus be denied". There was no opinion. A motion to rehear was also denied without opinion. We brought the case here on certiorari, 316 U. S. 654, because of the constitutional issues involved.

Habeas corpus is a remedy available in the courts of Kansas to persons imprisoned in violation of rights guaranteed by the Constitution of the United States. *Cochran* v. *Kansas*, 316 U. S. 255, 258. Petitioner's papers are inexpertly drawn, but they

do set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody. *Mooney* v. *Holohan*, 294 U. S. 103. They are supported by the exhibits referred to above, and nowhere are they refuted or denied. The record of petitioner's conviction, while regular on its face, manifestly does not controvert the charges that perjured evidence was used, and that favorable evidence was suppressed with the knowledge of the Kansas authorities. No determination of the verity of these allegations appears to have been made.[1] The case is therefore remanded for further proceedings. *Cochran v. Kansas, supra; Smith* v. *O'Grady*, 312 U. S. 329; cf. *Waley* v. *Johnston*, 316 U. S. 101, 104. In view of petitioner's inexpert draftsmanship, we of course do not foreclose any procedure designed to achieve more particularity in petitioner's allegations and assertions.

Reversed and remanded.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[1] In re Pyle, 153 Kan. 568, 112 P. 2d 354, is not such a determination. That was an appeal by petitioner from the dismissal of another petition for writ of habeas corpus by the Kansas district court for the Leavenworth district.